NATURAL LAW
LECTURE #4
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Natural Law, Modern Philosophy, and the Founding Fathers

Liberal individualism began to emerge in the period from the 16th to the 18th centuries. On the one hand we have the radical individualism of Thomas Hobbes, who assumed a state of nature in which there is no government or social organization, but only the drive for self-preservation that places one individual in competition with others, who operate under similar drives in a war of all against all. Hobbes sees natural law as a set of practical rules for survival. By contrast, John Locke follows thinkers like Hooker and Pufendorf and offers a theory of natural law that focuses on natural rights. He assumes that natural equality prevailed in the original condition of peace and good will, but that there was a willingness to establish a social contrast and to surrender prerogatives like the power to punish those who have done us wrong in order to gain more secure protection for one's other natural rights.

Leviathan by Thomas Hobbes (1588-1679): a radically individualistic natural law. His radical ideas generated a vigorous reaction by those who thought that people were basically rational and moral even in the state of nature. In *De jure naturae et Gentium* (1672) Samuel Pufendorf (1632-1694) argued for the existence of two innate inclinations: a natural sociability, as well as an inclination to self-love. John Locke (1632-1704) offers a creative alternative to Hobbes. In the *Second Treatise of Civil Government* (1691), Locke departs from a much more traditional view of natural law that he had taken in his 1664 work, published only in 1954 as *Essays on the Law of Nature*. Following a suggestion about the need in pre-political society for communal consent to some form of government in the *Laws of Ecclesiastical Polity* (1593) by Richard Hooker (1553-1600), Locke articulates a notion of the social contract made by individuals in the state of nature for the better protection of their natural rights. Locke envisions the state of nature not as Hobbes's war of all against all but a state of "peace, good-will, mutual assistance, and preservation" (#19). The natural equality of all individuals is Locke's reason for the necessity of the individual act of consent to any proposed government (and thereafter the tacit consent of individuals to obey the rules of the existing community in which they find themselves). For Locke, the concept of property comes from human nature. The right to exclusive material possession (property) comes from the mixture of one's labor ("property in his own person") with land or goods which do not already belong to someone else. Only through appropriation by an individual are the resources of the earth able to be used effectively for the preservation of humanity. The only natural limit on the accumulation of property is spoilage. A right to revolution if natural rights are seriously violated (if no other way to adjudicate the problem).

The Declaration of Independence claims the witness of "Nature and Nature's God" for its assertions about our inalienable rights to life, liberty, and the pursuit of happiness. Not only does the U.S. Constitution and the Bill of Rights contain such concepts as natural rights, the rule of law, the fundamental equality of all human beings, and the separation of powers, but the very supremacy of the Constitution is rooted in the recognition that it embodies the eternal and immutable principle of natural justice. Before the Continental Congress changed the wording, Jefferson's original draft used the words "sacred and inviolable" rather than "inalienable" – this may show what Jefferson had in mind by the term "natural right."Sir Edward Coke's *Institutes* and *Reports* were the standard works on British law until the publication of Blackstone's *Commentaries*. Coke cites *Calvin's Case* (1608) in which "the law of nature cannot be changed

or taken away" and "should direct this case." He also cites *Bonham's Case* (1609): "the common law will control the acts of Parliament and sometimes adjudge them to be utterly void."Sir William Blackstone's *Commentaries on the Laws of England* (1765) paradoxically contains both statements about the supremacy of natural law to all human legislation and assertions about the virtually unlimited authority of Parliament: For example, in support of natural law, Blackstone states: "This law of nature, being coeval with mankind and dictated by God himself, is superior in obligation to all others.... No human laws are of any validity if contrary to this."

Natural law allusions occur in the text of the Declaration – "Nature and Nature's God." Jefferson's first draft of the Declaration actually condemns slavery (and thus may be evidence that even the slaveholder Jefferson recognized slavery as a violation of the natural right to liberty) but the passage was removed by the Continental Congress, presumably out of a desire not to weaken support for the cause of independence by alienating slave-owners.

The Constitution of the United States not only reflects a number of important natural law concepts but in the course of the Republic's history has come to be regarded with the veneration it enjoys because of its embodiment of the "higher law" that is natural law. The legality and supremacy of the Constitution depends on natural law. Granted, one strand of thought takes lines such as "ordained... by the people of the United States" in an entirely voluntarist sense, as if law were simply an expression for the commands of the human lawgiver and as if the highest possible source for such commands consists in "the will of the people." There can be no doubt that the consent of the governed plays a large role in the common understanding of the legitimacy and authority of American constitutional government.

But historically the claim that supremacy and legitimacy comes solely from being rooted in the popular will is a theory of relatively recent origin that is forgetful of the "higher law" background that was operative for the founders of the American republic. For the American Founders, the supremacy of a constitution comes from its content – the way in which a given constitution embodies essential, unchanging justice, to which the people give witness precisely by choosing to enact such a constitution. To this essay after essay in *The Federalist Papers* gives witness. Among the natural law concepts that are most prominent in American constitutional history are the notions of the superiority of the rule of law to rule by power, judicial review, the separation of powers, and fundamental human equality. In contrast to the voluntarist assumptions of all rule by power, the American Constitution outlines a program for rule by law that depends on intellectual appreciation of the greater likelihood of natural justice and objective fairness when all parties know in advance the rules for conducting public business and public regulation of private enterprise. The power to supervise legislation and to nullify anything inconsistent with the Constitution does not rest on a power explicitly given to the judiciary anywhere in the Constitution and no court in England had such a power. The American practice of judicial review was inaugurated by Chief Justice John Marshall in *Marbury v. Madison* (1803).

A. P. d'Entreves, *Natural Law: An Introduction to Legal Philosophy* (1994 [1951]).
Stephen Buckle. *Natural Law and the Theory of Property: Grotius to Hume*, 1991).
E. Corwin, "The 'Higher Law' Background of American Constitutional Law" (1981 [1929]).